

Articles

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Private Standards of Fairness in European Contract Law

Abstract: The Unfair Terms in Consumer Contracts Directive contains a general clause according to which ‘a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’ (Article 3(1)). The open-textured nature of this clause requires further guidance as to what constitutes a significant imbalance contravening the principle of good faith. The question is whether self- and co-regulation of B2C contracts give rise to such guidance. This paper ascertains to what extent private or mixed standards are taken into consideration in the assessment of contract terms by civil judges. It depicts how private regulation flows into the judicial interpretation of the open fairness norm, especially in France (recommendations of the *Commission des clauses abusives*) and in the Netherlands (GTC agreed upon by both trade and consumer organisations). By taking this regulation into account while assessing the fairness of a contract term on the basis of a legal norm, civil courts confer legitimacy on it. It appears that private standards are deemed fair or viewed as a benchmark of fairness in view of their co-regulatory nature. Co-regulation however does not always vouch for *in concreto* and even *in abstracto* fair standards. It should therefore not exempt private standards from being put to a broader fairness review.

Résumé: La Directive sur les clauses abusives contient une clause ouverte selon laquelle ‘une clause d’un contrat n’ayant pas fait l’objet d’une négociation individuelle est considérée comme abusive lorsque, en dépit de l’exigence de bonne foi, elle crée au détriment du consommateur un déséquilibre significatif entre les droits et obligations des parties découlant du contrat’ (article 3-1). La nature indéfinie de cette clause requiert des repères supplémentaires pour établir l’existence d’un déséquilibre significatif enfreignant le principe de bonne foi. La question soulevée dans cet article concerne la mise à disposition de tels repères par des structures d’auto- et/ou de corégulation des contrats. Cette contribution examine dans quelle mesure des standards établis par des acteurs privés, seuls ou en coopération avec des acteurs publics, sont pris en considération lors de

l'appréciation du caractère abusif d'une clause contractuelle. Elle dépeint l'influence de ces standards privés ou mixtes sur la notion de clause abusive telle qu'elle est interprétée et appliquée par les juges civils en France ainsi qu'aux Pays-Bas. En laissant ces standards (les recommandations de la Commission des clauses abusives en France et les conditions générales bilatérales négociées par les associations de professionnels et de consommateurs aux Pays Bas) étoffer une norme légale, les juges leur confèrent une certaine légitimité. Il apparaît que l'influence de ces standards est étroitement liée au fait qu'ils soient le résultat de corégulation. Qu'un standard soit issu d'une forme de corégulation ne garantit néanmoins aucunement le caractère non-abusif de la clause contractuelle s'y conformant. Cette clause ne sera donc pas exempte d'une confrontation plus large à la norme établie par la directive.

Zusammenfassung: Der vorliegende Beitrag zielt darauf ab zu zeigen, wie wichtig private Regelsetzung für die richterliche Interpretation und Anwendung von Verbrauchervertragsrecht in der Europäischen Union ist. Dafür beleuchtet der Beitrag das Wechselspiel zwischen privater Regelsetzung zum Phänomen Standardklauseln (AGB) und der Auslegung, die die Generalklausel in der AGB-Richtlinie erfahren hat, nach der missbräuchliche Standardklauseln nicht bindend sind. Geben private Regelwerke dieser Generalklausel in der EG-Richtlinie mehr Gehalt und, wenn dies der Fall sein sollte, unter welchen Umständen wirken sie so und ist diese Wirkung normativ positiv zu bewerten – Letzteres unter dem doppelten Gesichtspunkt und der doppelten Zielsetzung dieser Richtlinie, dass sie den Verbraucherschutz fördern, vor allem aber auch harmonisieren soll.

Keywords: general fairness clause, unfair contract terms, general contract terms, self-regulation, co-regulation, European contract law

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I Introduction

In the field of consumer policy, private regulatory mechanisms are not so much an alternative as a complement to public rules. Self- or co-regulatory instruments can play an important role in delivering a high level of consumer protection. Co-regulation in this paper is used in the double sense of both cooperating with public actors and involving all stakeholders (such as trade and consumer associa-

tions).¹ This paper examines the role played by private standards with regard to the fairness of non-individually negotiated contract terms, also known as general terms and conditions (GTC), in the judicial interpretation and application of the fairness clause established by the Directive on unfair terms in consumer contracts (UTD).² Section II starts with a short description of the multi-layered legal fairness clause. The European fairness clause is interpreted and applied by courts and public authorities responsible for the enforcement of consumer law. The open-textured nature of the clause requires further guidance as to what constitutes an unfair contract term. Public sources (legal rules and principles, precedents, guidance from administrative bodies) provide some guidance, but to what extent do courts fall back on private regulation (model-contracts, two-sided GTC, recommendations, ADR)? Section III depicts the private policing of GTC in France, the Netherlands and England. These Member States (MS) were chosen for their divergent self-regulatory approaches to consumer GTC. Section IV subsequently explores whether and how private regulation is embedded in the judicial interpretation of the fairness norm in those MS. Finally, section V discusses the grounds on which legitimacy is conferred on private regulation. The significance of private standards of fairness for the harmonised interpretation and application of the European fairness norm will be discussed in section VI.

II The multi-layered open fairness norm

1 The European open fairness norm

The UTD contains an open-textured clause according to which ‘*a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer*’ (Article 3(1)). The UTD was conceived and eventually enacted as an open-ended system of control in which unfairness would depend on the specifics of each contractual relationship. As Article 4(1) UTD dictates, courts should take into consideration the nature of the goods or services for which the contract was

1 Cf G. Howells, ‘Co-Regulation’s Role in the Development of European Fair Trading Laws’, in H. Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices* (The Hague: Kluwer Law International, 2004) 120–121 and 126.

2 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* 1993 L95/29.

concluded, all the circumstances attending the conclusion of the contract and all the other terms of the contract or of another contract on which it is dependent. The good faith requirement permits an overall evaluation of the different interests involved. The circumstances the Directive and its recital refer to are both substantive (pertaining to the content of the terms) and procedural (relating to the conclusion of the contract).³ Both a concrete and an abstract review of a contract term are possible.⁴ The type of review will often depend on but should not be equated with the repressive or preventive⁵ nature of the procedure. An individual procedure can for example boil down to an abstract review (based on a black list).

Open norms constitute flexible safety nets that are able to 'catch' all kinds of new situations. A major disadvantage of open norms however is their high level of abstraction. The open fairness norm can generate many disputes about its interpretation and application to a particular contract term. The existence of a *significant* contractual *imbalance* and the breach of the *good faith*-requirement discern a fair contract term from an unfair one. It is however difficult to get grip on those criteria as they do not give clear information on the distinction between fair and unfair terms. The annex of the UTD provides some guidance on what terms may be regarded as unfair, even though this list of presumably unfair terms is indicative and non-exhaustive. In order to weigh the circumstances and to determine whether a contract term, contrary to the requirement of good faith, significantly brings the contract out of balance, courts might have recourse to complementary fairness indicators.

National courts are obliged to interpret the national fairness clause in conformity with the wording and purpose of the UTD in order to achieve the result referred to in Article 288(3) TFEU.⁶ The European Court of Justice (CJEU) has not conceded much information yet on how to interpret the UTD's open norm. The CJEU case law provides national courts leeway to decide how to weigh the established circumstances surrounding a particular case.⁷ Bypassing those circumstances is only allowed as far as this does not lower the level of protection granted to the consumer by the concrete assessment laid down by Article 3(1)

3 According to recital 16 'in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account'.

4 Case C-70/03, *Commission v Spain* [2004] ECR I-7999, para 16.

5 Article 7(2) UTD provides for both an administrative control and collective challenge of unfair terms.

6 Case C-14/83, *Von Colson & Kamann* [1984] ECR 1891, para 26.

7 Case C-237/02, *Hofstetter* [2004] ECR I-3403.

and 4 UTD.⁸ National courts retain discretion to rely on fairness benchmarks from national origin (such as lists, default rules⁹ or precedents) as long as they warrant the minimum level of protection guaranteed by the Directive. The problem is that the contours of this minimum level of protection remain vague as they have only loosely been marked by both the European legislator and the CJEU.¹⁰

2 The national open fairness norm in France, the Netherlands and England

The European fairness norm has been implemented through national legislation. The Dutch Civil Code already contained an open fairness norm under which the content of GTC could be reviewed. This norm transposes Article 3(1) UTD by forbidding ‘unreasonably burdensome’ contract terms (Article 233(a) of Book 6 of the Civil Code). English law lacked a general clause permitting the substantive review of (all types of) GTC and therefore a new open norm has been introduced into English law. Within the *Unfair Terms in Consumer Contracts Regulations* (UTCCR), the Regulation transposing Article 3(1) literally copies the European wordings. The French *Code de la consommation* already comprised an open norm prohibiting the use of unfair contract terms.¹¹ While incorporating the European norm into national law, the French legislator got rid of the good faith criterion, limiting the definition of an unfair contract term to a term that is causing a significant imbalance in the contracting parties’ rights and obligations.

The enforcement of the open norm from the UTD is largely a matter of individual and collective procedures before civil courts. In the three legal systems under scrutiny in this essay, administrative bodies are also entrusted with the public enforcement of the open norm and may take a case to court if a rogue trader persists in infringing on the legal standard, by means of a so-called

8 The CJEU itself applied an abstract review of a jurisdiction clause and declared it unfair as it was solely to the benefit of the trader and contained no benefit in return for the consumer: joined cases C-240/98 to C-244/98, *Océano Grupo* [2000] ECR I-4941. Circumstances surrounding the conclusion of the contract were deemed irrelevant: see *Hofstetter*, n 7 above, para 23.

9 Case C-415/11, *Aziz v Catalunyacaixa*, n y r, para 68; case C-226/12, *Constructora Principado v Menéndez Álvarez*, n y r, para 21.

10 C.M.D.S. Pavillon, *Open normen in het Europees consumentenrecht: de oneerlijkheidsnorm in vergelijkend perspectief* (Deventer: Kluwer, 2011) *passim*.

11 This norm was originally meant to be concretised through administrative decrees. After a successful ‘*coup d’État jurisprudentiel*’, civil courts nevertheless started reviewing GTC under this norm: cf F. Terré, P. Simler and Y. Lequette, *Droit civil – Les obligations* (Paris: Dalloz, 2005) 328.

injunctive relief.¹² This already occurred in England where the Office of Fair Trading (OFT), along with the local Trading Standards, plays a prominent role in the enforcement of the UTD (from April 2014, many of the functions of the OFT and Competition Commission will be combined into the new Competition and Markets Authority).¹³ In the Netherlands, the Authority for Consumers and Markets (the ACM) will soon be entrusted with the autonomous competence to enforce the fairness norm and to impose sanctions on deviant traders.¹⁴

3 National fairness benchmarks used by civil courts

To fill in the legal standard of fairness and more specifically the criteria defining an unfair term (being unreasonably burdensome in the Netherlands, causing a significant contractual imbalance in France and a significant contractual imbalance in breach of the requirement of good faith in UK) national courts may need additional standards of fairness. Some courts draw up the balance sheet without relying on extra benchmarks. The French circumstantial test is regularly confined to the search for a compensatory term elsewhere in the contract and the Dutch test frequently restricts itself to the balancing of the interests of the parties to the contract.¹⁵ Courts however often resort to complementary gauges of fairness to flesh out the legal criteria in the light of which the fairness of a contract term is being assessed. The indicative list of presumably unfair terms in the annex to the UTD is such a gauge. Fairness benchmarks are nonetheless far more numerous at the national level than at the European level. This essay will distinguish between public and private benchmarks of fairness from national origin. National public benchmarks consist of legal principles, default rules, lists or precedents.¹⁶ The availability, the use and the conclusiveness of those yardsticks vary greatly across MS.

12 The Dutch Consumer Authority was only recently initiated by Regulation (EC) No 2006/2004 on consumer protection cooperation.

13 *Director General of Fair Trading v First National Bank* [2001] 1 UKHL 52. However, UK's system of local authority enforcement contrasts with the enforcement framework found in other MS where the duty to enforce primarily falls to national authorities.

14 *Kamerstukken II* (Parliamentary Documents of the Lower House) 2012–2013, 33622, no 2.

15 Pavillon, n 10 above, para 359.

16 M. Tenreiro, 'The Community Directive on Unfair Terms and National Legal Systems' (1995) 3 *European Review of Private Law* 290.

Reasonable expectations doctrine

Dutch and English courts frequently translate the fairness test into an assessment of the reasonable expectations of the consumer, a legal principle holding that, in general, the provisions of a contract are to be interpreted according to how a ‘reasonable person’ or a ‘typical consumer’ (who is not trained in the law) would interpret them.¹⁷ A contract term is unfair as it frustrates those objectively defined expectations. These expectations are largely determined by the procedural circumstances of the case in combination with substantive benchmarks such as default rules (normative expectations – mostly in the UK) and business usage (descriptive expectations – mostly in the Netherlands, see IV.2).

Default rules

To assess the existence of a ‘*significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer*’ a judge can refer to non-mandatory rules. As the Commission notes, ‘*in order to determine whether a term can be declared unfair, (it is ...) not enough just to apply the general assessment criterion; one also has to determine what legal rule would apply in the absence of such a term.*’¹⁸ Non-mandatory rules are held to reflect the ideal balance of interests between the parties to the contract. Within French case law, the deviation from supplementary substantive rules of contract regularly determines the unfairness of the term.¹⁹ Likewise, the equivalence with mandatory or default rules often implies the term is fair.²⁰ According to Dutch law, the comparison with non-mandatory law is not conclusive and Dutch courts rarely refer to default rules.²¹ In England, ‘*default rules (including implied terms) and remedies*’ are an acknowledged benchmark of fairness but as ‘*contract law is not codified or*

¹⁷ C. Willett, *Fairness in Consumer Contracts. The Case of Unfair Terms* (Aldershot: Ashgate, 2007) 142 *et seq.*, 181–182. Cf *Director General of Fair Trading v First National Bank plc* [1999] EWHC Ch 206, para 39; *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), para 91.

¹⁸ Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (COM(2000) 248 final). See also case C-415/11, *Aziz v Catalunya Caixa*, n y r, para 68 and case C-226/12, *Constructora Principado v Menéndez Álvarez*, n y r, para 21.

¹⁹ See eg CFI Grenoble 17 November 2003 & CA Versailles 4 February 2004, available at <www.clauses-abusives.fr/juris/index.htm> accessed 7 January 2014.

²⁰ Cass Civ 1^{re} 1 February 2005, no 05-19692, Bull civ 2005 I, no 64, 56.

²¹ Amendment Korthals (no 30) and VC II 28 January 1985, Parliamentary History Book 6 of the Civil Code (Inv 3, 5 and 6), 1598.

anyway not regulated in detail there is a need for other indicators.²² What is more, the English judiciary has on occasion doubted whether the law of implied terms reflects the ideal balance of interests between traders and consumers.²³

Lists

As the UTD strives for minimum harmonisation, MS are allowed to enact stricter national standards, by invalidating contract terms or by shifting the burden of proof on to the professional party by means of national regulation. The Netherlands had already promulgated lists of 'black' and 'grey' terms prior to the UTD. Those lists were kept and even lengthened, thereby raising the fairness standard at the national level. French law prohibited a few terms at the time the Directive was implemented but the French legislator adopted both a 'black' and a 'grey' list in 2009. The fairness standard laid down in such lists is more concrete than the one provided by the open norm, giving courts and professionals firm guidelines to hold on to. In comparison, the English UTCCR provides in Schedule 2 the same list as appears in the UTD, stating in regulation 5(5) that such 'terms may be regarded as unfair'.

In the case of a conflict between a consumer and a business, Dutch and French courts first compare the contract term under review with the compulsory lists. Verification against the open norm only occurs if a term does not appear on the lists. A mere illustrative list serves as a benchmark when fleshing out the open norm. The English list of terms that may be regarded as unfair has the same indicative character as the annex of the UTD. This list, in particular point (q), is sometimes referred to as an argument underpinning the unfairness of a term.²⁴ Compulsory lists of suspicious terms may still serve as a yardstick when applying the open norm because of the close resemblance between the term under review and a term on the list (reasoning by analogy).

²² P. Nebbia, *Unfair Contract Terms in European Law. A Study in Comparative and EC Law* (Oxford: Hart Publishing, 2007) 155; Willett, n 17 above, 47–48 and 254. Pavillon, n 10 above, para 122–123 and 308–310.

²³ *DGFT v First National Bank* [2001] 1 UKHL 52, para 38.

²⁴ *Zealand v Laing Homes* [1999] CILL 1510; *Standard Bank London v Apostolakis* [2001] EWHC 493 (Commercial Court); *Picardi v Cuniberti* [2002] EWHC 2923 (TCC).

Precedents

This benchmark plays a significant role in the English common law legal system²⁵ but even in the Netherlands and France, court decisions involving the open norm sometimes furnish the basis for subsequent cases involving similar facts and issues.²⁶

Administrative guidance: soft public law

Decisions and guidance from (national or local) administrative bodies responsible for the enforcement of the fairness norm can also be viewed as public benchmarks of fairness. In the three MS under investigation this type of benchmark is only widely available in England.²⁷ However, English courts generally don't take the OFT-guidance into consideration when assessing the fairness of a contract term.²⁸ This is understandable in the light of the system of checks and balances.²⁹ *Ex ante* OFT-guidance is moreover fairly abstract in nature whereas the judicial assessment in the UK is very broad and factual.

Private benchmarks?

Next to public benchmarks, private benchmarks may also give courts something to hold on to. Private standards may help to inform the content of the fairness norm. The next paragraph explores what private regulation of GTC at the national level entails. Since private regulation aims at a minimum correction of market failures, the drafting of GTC by an individual trader is not in itself a form of private regulation and will not be dealt with in this paper. And since the fairness norm applies to business-to-consumer (B2C) contracts I will only focus on GTC that apply to B2C transactions, thereby making a distinction between the drafting and the reviewing of GTC by private actors (ADR).

25 *Domsalla v Dyason* [2007] EWHC 1174 (TCC), para 92; *Allen Wilson Shopfitters v Buckingham* [2005] EWHC 1165 (TCC), para 41–45.

26 CFI Leeuwarden 7 May 2004, ECLI:NL:RBLLE:2004:AO9738.

27 Due to the lack of compulsory lists, the OFT relies on the open norm and the indicative list.

28 One exception is *Peabody Trust v Reeve* [2008] EWHC 1432 (Ch), para 54–55.

29 The pro-consumer guidance issued by the OFT does not address national courts.

III The private standards at hand

1 The drafting of GTC: the legal framework

Considerations of economic efficiency urge professionals to make use of model contracts. The drafting of standard contract terms is in itself the most important and purest form of self-regulation in the field of contract law.³⁰ Professionals are, to a certain extent,³¹ free to define the small print on which the contract will be concluded with a consumer and to specify or even deviate from the legal standards.³²

How much space is left to traders to define GTC mainly depends on how tightly sectors are regulated at the national level and the quantity of mandatory clauses professionals have to reproduce. In France, there are huge exceptions to the freedom to decide on the content of a contract as evidenced by the regulatory technique of inserting terms into certain types of contract directly by law or by public bodies under legal powers.³³ The numerous decrees and compulsory model contracts existing in France considerably reduce the scope for private regulation.³⁴

The Dutch legislator actively stimulates self-regulation of B2C contracts.³⁵ The Dutch Civil Code countenances bilateral GTC by giving the professional an opportunity to modify his terms in a mutual dialogue before allowing a consumer

30 T. Van Mierlo, 'Self-regulation in the consumer field: the Dutch approach', in J. Rutgers (ed), *European Contract Law and the Welfare State* (Groningen: Europa Law Publishing, 2011) 2; J.B.M. Vranken, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Algemeen Deel* [3], *Een vervolg* (Deventer: Kluwer, 2005) 88–89.

31 M. Hesselink, 'Non-Mandatory Rules in European Contract Law' (2005) 1 *European Review of Contract Law* 67–68.

32 Traders may deviate from non-mandatory rules and specify open-formulated mandatory rules and general clauses.

33 S. Whittaker, 'Contractual Control and Contractual Review in England and France' (2005) 6 *European Review of Private Law* 758. Credit contracts for example have to reproduce one of the nine model contracts drawn up by the national legislature. Besides such model contracts French law also provides for (*modèles de*) *cahiers des charges*: terms on which certain contracts involving a (former) public service are concluded and that are set by administrative decree.

34 In the 80s, a proposal to bestow an important role on collective agreements (*accords collectifs*) that would regulate GTC failed to be translated into French consumer law: see G. Raymond, *Droit de la consommation* (Paris: Lexis Nexis, 2008) 373.

35 T. Van Mierlo, 'Consumer Protection on the Single Market: Self-Regulation for Dating Services', in K. Boele-Woelki and F. Grosheide (eds), *The Future of European Contract Law* (The Hague: Kluwer Law International, 2007) 413–414. The Dutch Civil Code fosters the dialogue between consumer and professional organisations.

organisation to start an action (Article 240(4) of Book 6). Self-regulation is considered to have many advantages in comparison to public regulation as it directly answers the specific needs of a sector, increases commitment and rapidly addresses changing circumstances.³⁶ English law also fosters self-regulatory practice, entrusting the OFT with the task to publicly endorse codes of conduct.³⁷ Those codes guide contractual practices that will materialise in GTC (eg warranties, complaint and settlement of dispute).

From the perspective of consumer protection, it is crucial that consumer GTC are made consistent with the legal standard or even improve upon the level of protection warranted by law. The UTD does however not *explicitly* incite professionals to join efforts to draft GTC that meet the fairness standard. Article 7(2) only requires MS to ensure that the use of unfair terms is effectively prevented. The significance of ‘consumer-friendly’ self-regulation differs greatly across MS, as does the interference by public authorities and the direct involvement of consumer organisations into the self-regulatory process. We therefore encounter different kinds of GTC applicable to B2C contracts at the national level: unilateral GTC on the one hand, which are drafted with or without sectoral cooperation and with or without the assistance and approval of public authorities and bilateral conditions on the other hand, which are directly agreed upon by consumer organisations. Unilateral GTC may or may not be specially tailored to B2C transactions.

2 The drafting of unilateral GTC applicable to B2C transactions: the level of sectoral cooperation

Sectoral organisations are best placed to draft GTC as they have the best overview and knowledge of the peculiarities of the business sector.³⁸ In the MS under scrutiny there is difference in the degree to which professionals spontaneously organise themselves in trade bodies *and* subsequently draft standardised GTC within a branch of business.³⁹ Trade associations do not have the same size and degree of cohesion.

³⁶ See Van Mierlo, n 30 and 35 above.

³⁷ Enterprise Act 2002, s 8(2).

³⁸ See Vranken, n 30 above.

³⁹ The existence of a trade association does not guarantee that model contracts will be drafted. There are many European sectoral associations but few have yet managed to draft pan-European sets of GTC to be applied in the same sector throughout the EU.

Traders are well-organised in the Netherlands and trade bodies generally develop GTC for their members.⁴⁰ Many professionals dealing with consumers⁴¹ have joined the easily identifiable national trade bodies that have reached an agreement with consumer associations on bilateral GTC (see III.4).⁴² The Netherlands are well known for their strong tradition of social dialogue (the acclaimed *polder model*).

Traders in the UK also largely organise themselves in local and national trade bodies. English trade and professional associations sometimes devise GTC for their members. An example of GTC that also apply to B2C contracts are the conditions of engagement included in the standard form of appointment (SFA) developed by the *Royal Institute of British Architects* (RIBA). Most associations only issue guidelines or codes of practice though. Subscribers to those codes however have to incorporate contractual practices stemming from those guidelines and codes into their consumer GTC.

In France, organisations of traders dealing with consumers are less active than their Dutch and English counterparts. Existing trade associations, like for example the FNAEM (home furnishing), do not provide for GTC and rarely issue codes of conduct or other forms of guidance. There are however a few exceptions: a code of conduct that will influence the formulation of GTC applicable to the online sale of electrical and electronic devices was recently devised by the FEVAD (e-commerce and distant selling) and several other trade organisations.⁴³

Professionals dealing with consumers who draft GTC without assistance of a trade association – either because they decline this support or because such assistance is not available – still have different ‘tools’ at their disposal. These model contracts are designed by independent private intermediaries such as legal scholars or lawyers. Publishers may provide for standard contracts.⁴⁴

⁴⁰ Those traders who are not affiliated to a trade association may nevertheless apply GTC that were drafted by such an organisation.

⁴¹ Professionals who deal with ‘consumers’ within the sense of the UTD are, among others, furniture retailers, travel agents, direct sellers, architects, public transporters, car renters, dealers and repairers.

⁴² Different branch organisations – the association representing the mental health sector (GGZ) and the Dutch Hospitals Association for example – are currently still negotiating two-sided GTC.

⁴³ This code can be consulted at <www.fevad.com/uploads/files/Publications/Guide_bonnes_pratiques_ecommerce_251011.pdf>.

⁴⁴ English tenants, for example, can obtain printed forms from Law Pack Publishing and Oyez. The OFT controls the fairness of such documents: *Khatun v Newham LBC* [2004] EWCA Civ 55, para 47.

3 Unilateral sector-specific consumer GTC drafted with the help of public authorities

Public authorities may encourage professionals to draw up *fair* consumer GTC. In the UK, the OFT recommends trade associations create model terms for their members as *'this is an effective way to raise standards in a large number of contracts and in a sector as a whole'*.⁴⁵ The OFT sometimes works together with trade bodies to produce those terms and provides assistance to trade bodies who wish to draft consumer-friendly GTC.⁴⁶ More generally, it supports the self-regulatory process providing guidance and expertise to traders dealing with consumers. The OFT-guidance is based on a sample of agreements and its experience with enforcing the legal standard and whilst it is primarily meant for the OFT's partners in consumer law enforcement (the Trading Standards), it is also designed to help professionals meet the legal requirements.

The OFT has for a certain period of time even officially approved codes of conduct. The OFT's Consumer Codes Approval Scheme (CCAS) aims at increasing consumer confidence. A business that displays the CCAS logo is considered making use of clear and fair GTC. The Carpet Foundation, the Society of Motor Manufacturers, the British Association of Removers, the Vehicle Builders and Repairers Association and the Direct Selling Association all have successfully achieved approval of their codes of conduct. The success of this approval scheme, however, remains limited and public funding has stopped.⁴⁷ Meanwhile, the Trading Standards Institute (TSI), the local enforcement authority with whom the OFT closely cooperates (the OFT only focuses on systemic failures in a market), has established a successor scheme to the Consumer Codes Approval Scheme on a self-funding basis.⁴⁸

⁴⁵ The OFT advised the Society of Ticket Agents and Retailers to draft GTC for its members: available at <www.star.org.uk/media/4775/tc.pdf> accessed 7 January 2014.

⁴⁶ For example, the British Holiday and Home Parks Association and the National Caravan Council approached the OFT to discuss model terms and conditions contained in the Purchase Agreement and Licence Agreement for a Holiday Caravan Pitch.

⁴⁷ BIS, 'Empowering and Protecting Consumers: Consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement' (June 2011) 8 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/31394/11-970-empowering-protecting-consumers-consultation-on-institutional-changes.pdf> accessed 7 January 2014.

⁴⁸ <www.tradingstandards.gov.uk/advice/ConsumerCodes.cfm> accessed 7 January 2014. The potential costs associated with lack of consumer confidence due to removal of the OFT consumer code approval scheme are expected to be negligible: *ibid* 2. Under the UK Government's proposals to create a single Competition and Markets Authority (CMA), the OFT will be merged into the new

French professionals seek guidance in the recommendations of the *Commission des clauses abusives* (CCA), a public *ad hoc* authority attached to the Minister in charge of Consumer Affairs that consists of a member of the national legal service, two legal or administrative magistrates or members of the Council of State, two entities qualified in contract law or technique, four professionals' representatives and four consumers' representatives.⁴⁹ The CCA recommendations can be looked upon as mixed public-private guidance.

The French CCA is part of an administrative system of control of unfair terms that has purely consultative duties.⁵⁰ The CCA examines standard form contracts either at a consumer or professional organisation's request or on its own motion, and subsequently invites professionals to review their terms on the basis of the recommendations. The duties of the CCA are to control the GTC of contracts normally proposed to consumers and to recommend suppression or modification of terms that create a significant imbalance between rights and obligations of the non-professional as opposed to those of the professional. The mainly sectoral recommendations are guides enabling professionals to identify unfair terms.⁵¹ Recommendations are often followed and the Movement of French Enterprises recommends businesses to do so.⁵²

body which will have a principal focus on competition and markets. For the same, debatable, reasons why the Commission is not empowered to endorse European codes of conduct, a continuing role in consumer codes approval is not deemed appropriate for the CMA: BIS, 'Empowering and Protecting Consumers: Consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement' (June 2011) 8 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/31394/11-970-empowering-protecting-consumers-consultation-on-institutional-changes.pdf> accessed 7 January 2014.

49 Article R 534–1 *Code de la consommation*.

50 Originally the law containing the French fairness norm was meant to set up an administrative system of control of unfair terms within which the executive would prohibit certain clauses by decree, based on the CCA recommendations.

51 Recommendations can be consulted at <www.clauses-abusives.fr/recom/index.htm> accessed 7 January 2014.

52 Guide MEDEF *Comment éviter les clauses abusives*.

4 Sector specific consumer GTC drafted via a social dialogue mandated by a public authority

In the Netherlands, the process of self-regulation entails a dialogue between business and consumer organisations that gives rise to bipartisan GTC. The self-regulatory consultation coordination group of the Dutch Social and Economic Council (SER) offers both parties an open framework for their talks on well-balanced standard terms in accordance with the SER's statutory task to promote desirable trends in business and industry. The SER provides for procedural rules and expertise but is itself not a party to the agreement.

Nearly each branch of business has its own Consultation Group on equitable standard terms and conditions: car dealers (BOVAG), travel agents (ANVR), bankers (ABV) or furniture retailers (CBW). While taking into account the specific characteristics of the branch, the Group tries to work out the statutory provisions on consumer GTC (the lists) and the law applicable to the branch as accurately as possible.⁵³

The Dutch bipartisan GTC are coupled to a complaints-handling system and private bilateral dispute committees called Consumer Complaints Boards (there are 41 of them).⁵⁴ Dispute committees are approved by the Minister.⁵⁵ The Boards solve disputes related to the compliance with, eg the interpretation and application of the bilateral standard terms. Rulings by the dispute committees are taken into account while updating the GTC.

5 *Ex ante* co-regulation of GTC

In all three MS, co-regulation contributes to prevent the use of unfair GTC in consumer contracts. To this end traders join forces with public actors (co-regulation I) and/or with consumer associations (co-regulation II). Co-regulation of GTC that are destined to be incorporated into B2C contracts has many faces.

First, the national public entity associated with private regulation of consumer GTC differs. The OFT/TSI in the UK, the CCA in France and the Dutch SER

⁵³ Reference can also be made to codes of conduct by which the sector has already distinguished itself: available at <www.ser.nl/en/about_the_ser/responsibilities/general_terms.aspx> accessed 7 January 2014.

⁵⁴ Almost all dispute committees operate under the banner of a separate foundation called *De Geschillencommissie*.

⁵⁵ In some sectors there is a legal requirement for a dispute committee to be set up (network sectors and financial services).

have very distinct duties. The OFT and the TSI are the administrative authorities in charge of enforcing the legal fairness standard by testing GTC against this standard (Article 7 UTD) whereas the CCA and the SER do not have any such duties. The SER is the economic advisory council of the Dutch government and the main platform for social dialogue. The CCA is a purely consultative administrative body.

Secondly, great differences concern the type of ‘assistance’ public authorities provide to professionals who intend to draft consumer-friendly GTC. Whilst the OFT and TSI encourage sectoral trade organisations to draft codes of conduct and may approve of the result, the SER and the CCA facilitate a dialogue between trade and consumer representatives. A distinctive feature of the SER is that it coordinates negotiations between professional and consumer organisations on GTC. The SER-platform provides for sets of bilateral consumer GTC whereas the CCA issues guidance and advice as to which terms are considered unfair.

Third, the involvement of consumer organisations into the drafting process varies a great deal across the MS. The drafting of bilateral GTC is a form of social dialogue that hardly exists in France and in the UK. Whilst consumer representatives contribute to bring forth recommendations in France, English consumer organisations remain on the sideline. The OFT defends the interests of the consumer, at the expense of consumer organisations.

6 Private reviewing of contract terms: *ex post* private standards of fairness

Besides preventing the use of unfair GTC, private actors contribute to the effective enforcement of the fairness clause. The *saisine*-procedure (Article R 534-4 *Code de la consommation*) permits courts to ask the CCA for advice in a particular case. An advisory opinion may be requested when, upon the occasion of proceedings, the unfair nature of a contractual term is alleged. The competent judge may ask the CCA, by decision not open to appeal, for its opinion on the unfair nature of this term as defined by Article L 132-1 *Code de la consommation*. An advisory opinion is not binding upon the judge who called for it.

Private standards of fairness also come forth out of the enforcement of the legal fairness norm by private actors. Subscribing to a code of conduct generally gives professionals access to conciliation services and/or a low-cost, legally binding arbitration scheme. Consumer GTC often contain an ADR clause. As a result, private actors sometimes find themselves in the position they have to review GTC (and among other clauses, the adjudication clause conferring them their powers) under the legal fairness norm. The availability and accessibility

of such rulings are more limited in France⁵⁶ and the UK⁵⁷ than in the Netherlands.⁵⁸

In the Netherlands, the bipartisan GTC are coupled to a complaints-handling system and private bilateral dispute committees,⁵⁹ approved by the government.⁶⁰ The dispute committees tied to the bilateral GTC are sometimes held to apply the fairness test. They apply this test to the two-sided GTC (which are generally deemed fair) but also to supplementary clauses the professional chooses to incorporate in a B2C contract. The Dutch Council for arbitration disputes (the *Raad van Arbitrage*, which is not linked to the SER) frequently assesses the fairness of adjudication clauses in standard construction contracts. In those assessments it gives much significance to the fact that consumer organisations have been involved into the wording of the terms.⁶¹ Arbitrators once called the bipartisan character of an arbitration clause a decisive argument.⁶²

7 Private standards and the *preventive v repressive* enforcement of the fairness clause

The table below places the private (or mixed) standards within the broader picture of the enforcement of the UTD clause. It distinguishes between the preventive and the repressive enforcement of the fairness standard. The collective enforcement of the clause by public agencies and the judiciary is seldom genuinely preventive (or *ex ante*, in the sense that the reviewed GTC have not yet been incorporated into

⁵⁶ In France, consumer mediation takes place in the field of public utilities, insurances, banking, telecommunications, health care, tourism, car sales and repair. Many sectors and major companies have mediators at their disposal that can best be compared to what is called an 'ombudsman' in many MS: Ch.J.S. Hodges, I. Benöhr, N. Creutzfeldt-Banda (eds), *Consumer ADR in Europe* (Oxford: Hart Publishing, 2012) 37.

⁵⁷ OFT approved codes provide for low cost, independent dispute resolution if a complaint is not dealt with satisfactorily.

⁵⁸ Decisions by the Consumer Complaints Boards can be found at <www.degeschillencommissie.nl/home> accessed 7 January 2014.

⁵⁹ The Boards solve disputes related to the compliance with, eg the interpretation and application of the bilateral standard terms. Rulings by the dispute committees are being taken into account while updating the GTC.

⁶⁰ In some sectors there is a legal requirement for a dispute committee to be set up (network sectors and financial services).

⁶¹ RvA 21 September 2011, no 32.910, para 28.

⁶² RvA 19 June 1997, (1998) *Bouwrecht*, 778.

B2C-contracts).⁶³ The fairness clause is generally applied after the consumer GTC already have been incorporated in B2C-contracts. A preventive collective or administrative procedure then aims at preventing the *continued* use of the term (Article 7 UTD). A repressive procedure is generally directed at a concrete contract term in an individual B2C-contract.

	France	United Kingdom	The Netherlands
Preventive enforcement of the fairness clause⁶⁴			
Private or mixed standards	Recommendations of the CCA	Publicly approved codes of conduct	Drafting of bipartisan GTC (social dialogue)
Main type of B2C-GTC	Unilateral without much sectoral cooperation	Unilateral with sectoral cooperation	Bilateral with sectoral cooperation
Preventive enforcement of the UTD by supervisory authorities	Limited The <i>Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes</i> (DGCCRF) (not the CCA) is controlling the GTC (applying a sectoral approach). Its competences (which were strictly limited to the listed clauses) have recently been enlarged. ⁶⁵	Important The OFT and the TSI have both an advisory and a controlling role. The TSI can approve of codes of conduct. Approved self-regulation does however not give a 'safe harbour' from potential action. ⁶⁶ The OFT and the Trading Standards are very active in enforcing the Regulations and in securing significant changes in contract terms.	Very limited The ACM (not the SER) is responsible of enforcing the UTD. It will soon autonomously enforce the fairness clause. ⁶⁷ The ACM does not focus on GTC in its supervisory policy and does therefore not actively contribute to the preventive enforcement of the UTD.

⁶³ One of the few examples I know of is: SC 16 May 1997, NJ 2000, 1, ECLI:NL:HR:1997:ZC2372.

⁶⁴ Case C-372/99, *Commission v Italy*, [2002] ECR I-819, para 15; case C-472/10, *Invitel*, n y r, para 37.

⁶⁵ Article L 141–1 *Code de la consommation*.

⁶⁶ OFT, 'Policy Statement on the role of self-regulation in the OFT's consumer protection work' (September 2009) s 2.8 <www.of.gov.uk/shared_of/reports/consumer-policy/of1115.pdf> accessed 7 January 2014.

⁶⁷ It already has the power to sanction the use of black-listed contract terms.

	France	United Kingdom	The Netherlands
Judicial preventive enforcement of the UTD	Important Injunctive procedures initiated by consumer associations (not the DGCCRF) play a substantial part in preventing the (continued) use of unfair terms. ⁶⁸	Limited Injunctive procedures are scarce (and generally initiated by administrative authorities).	Limited Injunctive procedures are scarce (and generally initiated by consumer associations).
Repressive enforcement of the fairness clause			
Private or mixed standards	ADR rulings Advisory opinions of the CCA (<i>avis</i>). ⁶⁹	ADR rulings	ADR rulings (dispute committees)
Judicial repressive enforcement of the UTD	Important	Important	Very important
Type of judicial review ⁷⁰	The French method of review is characterised by (1) attention to the term itself in the light of the legal framework (the lists included) and (2) a strong focus on assessing the contractual balance. It is fairly abstract in nature.	The English review gives ample attention to the specific circumstances of the case: the specific determinations of 'substantive unfairness' and 'procedural unfairness' usually representing the two 'cumulative' steps under the English test.	The Dutch review involves a broad and very concrete test with large attention for the personal and procedural circumstances of the case. The lists however vouch for a fairness test that is more abstract in nature.

In France, the emphasis lies on the judicial, both preventive and repressive, enforcement of the clause. A co-regulatory platform involving both public and private actors, however, serves for issuing recommendations from which traders can draw inspiration when drafting their GTC. These recommendations are not

⁶⁸ Cass Civ 1^{re} 1 February 2005, no 03–16905, GTC that are no longer being used in *new* contracts cannot be subject to a collective review. Those GTC can, in the event that they have been included in a contract, only be subject to a repressive test.

⁶⁹ Advisory opinions are available at: <www.clauses-abusives.fr/avis/index.htm> accessed 7 January 2014.

⁷⁰ Pavillon, n 10 above, *passim*.

binding⁷¹ and the question arises: to what extent do both the preventive and repressive judicial enforcement of the fairness clause rely on the recommendations and advisory opinions of the CCA (IV.3)?

In the UK, trade associations and public enforcement agencies cooperate actively in the *ex ante* stage. The preventive enforcement of the fairness clause primarily boils down to the guidance and advice provided by public authorities. The emphasis on informal processes and the fact consumer associations remain somehow withdrawn might account for the lack of judicial preventive enforcement of the fairness clause. In the Netherlands, a prolific social dialogue takes place under the auspices of the SER (a public body that is *not* responsible for enforcing the directive). The extensive informal co-regulatory process downsizes the role of the public enforcement agencies. It indeed explains why there is less need for the ACM to preventively screen GTC (other reasons being the lack of human and material resources). Consumer associations, by contributing actively to the co-regulatory process, also have less leeway to ask for a collective judicial application of the legal standard to unfair GTC (Article 240(5) of Book 6 of the Dutch Civil Code). In both MS, the judicial enforcement of the fairness clause remains thus largely confined to repressive procedures. The question is whether GTC that are based on publicly approved codes of conduct (in the UK) or bipartisan GTC (in the Netherlands) are being put to the fairness test and if so, whether they are given a preferential treatment (IV.4).

The next paragraphs will analyse the extent to which private (or mixed public-private) standards (both *ex ante* and *ex post*, IV.5) flow into the judicial interpretation of the fairness clause in the three MS. Contract law (enabling and open-worded rules) constitutes a starting point for private (or mixed) standard-setting. The question arises whether these standards feed back into contract law and more specifically into the fairness clause, through court decisions.

IV Private standards of fairness

1 Judicial governance

Although many disputes involving GTC don't reach the courts as they are resolved through ADR or through negotiations with an administrative body, the body of case law with regard to the fairness of GTC is still growing. This paper examines

⁷¹ Conseil d'Etat 16 January 2006, nos 274721–274722.

the extent to which private (or mixed) standards are being taken into consideration in the assessment of contract terms by civil judges. The legal standard is not clear due to the openness of the fairness norm and the lack of guidance provided by the CJEU. It is for the courts to decide whether the legal fairness standard is met, how interests should be balanced and what circumstances should prevail. In their search for benchmarks of fairness national courts may attach some significance to private standards.

By enacting a substantive fairness analysis, the European legislator has chosen a *fairness-oriented* approach and distanced himself from the *freedom-oriented* approach of consumer contracts within which the content of the agreement is not subject to a fairness review.⁷² The freedom-oriented approach departs from the basic assumption that individual consumers are capable to defend their own interests as long as they are duly informed about the terms of the contract. The fairness-oriented approach does not restrict itself to examining procedural safeguards but extends to controlling the *content* of contract terms. The European fairness test is in essence a corrective mechanism for unfair market practice. Strikingly, market practice nonetheless influences the outcome of the fairness test in the Netherlands.

2 Market practice as a standard of fairness (reasonable expectations)

In the Netherlands, the fact that the terms mirror business custom and usage, meaning they are ‘*gebruikelijk*’ (usual) by comparison of the type of terms used by other traders in the sector, regularly weighs in favour of the term. The widespread use of a term generally serves as a benchmark of fairness in the judicial review of standard terms in B2B-contracts.⁷³ When the fairness norm is applied to a B2C dispute, the compliance with customary business practice however carries less weight.⁷⁴ Some courts nevertheless take business custom into account when determining the reasonable expectations of the consumer; the usual nature of a term sometimes being the only determinant.⁷⁵

⁷² See Willett, n 17 above, 3–4.

⁷³ The Dutch fairness test applies to SMB2B-contracts.

⁷⁴ CFI Almelo 27 January 2009, ECLI:NL:RBALM:2009:BH1279.

⁷⁵ CFI Arnhem 19 May 2004, ECLI:NL:RBARN:2004:AQ5066, para 13; CA Amsterdam 26 January 2006, NJF 2006, 269, para 4.6; CA Den Bosch 9 January 2007, ECLI:NL:GHSHE:2007:AZ5893; CFI Alkmaar 20 October 2010, ECLI:NL:RBALK:2010:BP7266, para 8. This is also the case in Poland:

Unlike their Dutch counterparts, French and English courts never refer to standard trade usage as a benchmark of fairness in the review of a B2C contract term under the legal norm from European origin. According to the French Supreme Court, the widely accepted and repeated use of a clause does *on no account* operate as an evidence of fairness in B2C relationships.⁷⁶ In English case law, the usual nature of a term would in itself not suffice to fix the reasonable expectations of a consumer.⁷⁷ Equally or even more relevant is the detriment the term may cause to the consumer and whether the consumer was duly informed about this. Courts applying the fairness test draw in this respect inspiration from the common law rules on incorporation. These rules provide a remedy in relation to contract clauses that are particularly onerous and *unusual* and that are not brought to the attention of the consumer. For that matter, the adjective ‘usual’ is approached differently by Dutch and English courts. The latter will not view a contract term as being usual simply because it forms part of profession-wide standard terms.⁷⁸ The fact that GTC have been drafted by a business sector organisation and coupled to some kind of professional guidance (a code of conduct for example) has not prevented them from being regarded as unusual when applied on an once-only B2C agreement.⁷⁹ Such an agreement is ‘*a very unpromising basis upon which to found an invariable, certain and general usage of a trade*’.⁸⁰

According to the Unfair Commercial Practices Directive *honest* market practice helps define the fairness of commercial practices (Article 2(h)).⁸¹ The fairness of GTC reflecting market practice also depends on its honest and fair character. This means additional benchmarks of fairness are required.

see F. Cafaggi, ‘Which Governance for European Private Law?’, EUI Working Paper Law No 2007/26, 20, which refers to a decision of the Polish Competition and Consumer Protection Court holding a clause entitling the seller to retain two installments if the consumer rescinds the contract to be fair because it ‘(did) *not deviate from the accepted trade usage*’.

⁷⁶ Cass Civ 1^{re} 31 January 1995, no 93–10412, Bull civ 1995 I, no 64, 45. CA Agen 3 October 2006, no 05/01484.

⁷⁷ See Willett, n 17 above, 326–327.

⁷⁸ *Munkenbeck & Marshall v Harold* [2005] EWHC 356 (TCC), para 15.

⁷⁹ The High Court held some provisions in the industry standard for the terms of appointment of architects SFA/99 to be unfair in view of the RIBA-guidance that clearly requires the members to individually negotiate these (detrimental) provisions: *Picardi v Cuniberti* [2002] EWHC 2923 (TCC), para 132–133; *Munkenbeck & Marshall v Harold* [2005] EWHC 356 (TCC), para 15.

⁸⁰ *Office of Fair Trading v Ashbourne Management Services* [2011] EWHC 1237 (Ch).

⁸¹ Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ 2005 L 149/22).

3 Mixed public-private recommendations as a standard of fairness

In France, the standards set by the mixed public-private recommendations are something national courts hold on to when looking for additional fairness benchmarks. The French judiciary is not bound by the standard laid down in the CCA recommendations.⁸² Those documents are, however, an important source of inspiration to courts applying the fairness test. Even though the Court of Cassation stresses their indicative value, French lower courts often rely on recommendations. Their persuasive value is strong, in the sense that clauses that abide by the recommendations of the CCA are deemed fair and clauses that deviate from it are considered unfair (both categories being equally important, which stresses the fact that recommendations are often complied with).⁸³ As for the, by and large, rarely requested advisory opinions of the CCA, courts generally follow them.⁸⁴ The French fairness test often consists of a contractual balancing that is very much simplified by the recommendations as they show how to make up the balance. Recommendations are mainly referred to in preventive procedures. French consumer organisations have often seized the opportunity to enforce the recommendations they helped drafting by using the injunctive procedure of Article L 421–6 *Code de la consommation*. The predominantly abstract and preventive nature of a collective procedure matches that of the recommendations. Recommendations bear a ‘phantom character’ in the sense that ‘*here and there it is law applied without context*’.⁸⁵ Recommendations, however, also play a key role in individual procedures. Even in more concrete repressive procedures, recommendations are used as a benchmark of fairness and made ‘binding’ in the courts.⁸⁶

⁸² Conseil d’Etat 16 January 2006, nos 274721–274722; Cass Civ 1^{re} 13 November 1996, no 94–17369, Bull civ 1996 I, no 399, 279; Cass Civ 2^e 22 January 2009, no 07–21698.

⁸³ Cass Civ 1^{re} 10 February 1998, no 96–13316, Bull civ 1998 I, no 53, 34; Cass Civ 1^{re} 20 March 2013, no K 12–14.432; Cass Civ 1^{re} 28 May 2009, no 08–15.802 (indirect influence); CA Reims 19 May 2005; CA Paris 13 February 2009; TGI Grenoble 1 March 2010 (non-conformity); CA Grenoble 23 November 1999; CA Rennes 26 September 2002; CA Grenoble 18 May 2010 and 22 November 2010 (conformity); CA Nîmes 19 March 1998; TGI Nanterre 2 June 2004 (both conformity and non-conformity): available at <www.clauses-abusives.fr/juris/index.htm> accessed 7 January 2014.

⁸⁴ See eg CA Limoges 5 April 2006; TGI Vanves 28 December 2005: available at <www.clauses-abusives.fr/juris/index.htm>.

⁸⁵ H.W. Micklitz, ‘Some reflections on *Cassis de Dijon* and the Control of Unfair Contract Terms in Consumer Contracts’, in H. Collins (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Alphen a/d Rijn: Kluwer Law International, 2008) 30.

⁸⁶ CA Paris 2 May 1995; CA Versailles 21 November 2003 (conformity); CA Rennes 4 July 2003; Juridiction de proximité de Nantes 30 November 2007; TI Charleville Mézières 11 October 10

Like the UTD list, which kept its indicative nature after transposition, the recommendations have compensated for the lack of legislative lists of unfair terms. Now that such lists exist, their importance might decrease. The recommendations have also made up for the absence of two-sided terms as they are geared to the specific characteristics of different branches of business.

4 Two-sided or publicly approved GTC as a standard of fairness

Dutch consumer groups who have agreed with the professionals' general terms and conditions are not allowed to bring an action against him (Article 240(5) of Book 6 of the Civil Code). The model contract produced by the consultation group may still be challenged for legal invalidity by administrative authorities and by individual consumers. The Netherlands ACM (which will soon autonomously enforce the fairness clause), however, only targets one-sided GTC, leaving bipartisan GTC unstirred. The judiciary exerts only repressive control over two-sided GTC. And even this control is restrained since the private dispute resolution system absorbs many complaints.

The 'coming into being of the GTC' is one of the circumstances Dutch courts have to take into account when testing a term against Article 233(a) of Book 6 of the Civil Code. The Dutch Supreme Court recently stressed the 'great importance' attached to the dialogue between professionals and consumer representatives by the provisions on GTC of the Dutch Civil Code. While assessing the fairness of a procuration clause in a bank's GTC, it underlined the similarity between the clause under review and the procuration clause in the two-sided general banking terms (to which the bank in question had not subscribed).⁸⁷ The fact that the wording of the clause was identical to the wording of a clause that had been approved by the *Consumentenbond* carried weight.

The involvement of the general Dutch Consumers' Association in establishing the GTC used in a particular sector is – when courts refer to it – a major argument in favour of the fairness of a standard term,⁸⁸ although it is generally *not* the sole

(non-conformity), available at <www.clauses-abusives.fr/juris/index.htm> accessed 7 January 2014.

⁸⁷ SC 3 February 2012, ECLI:NL:HR:2012:BT6947, para 4.4.5.

⁸⁸ CFI Maastricht 1 November 1995, Prg 1996, 4602; CA Den Bosch 16 July 2002, NJ 2003, 445; CFI Assen 4 July 2008, ECLI:NL:RBARN:2008:BD6324; CFI Alkmaar 5 November 2008, ECLI:NL:RBALK:2008:BG5040; CFI The Hague 5 August 2009, ECLI:NL:RBSGR:2009:BJ5496; CFI Arnhem 30 December 2009, ECLI:NL:RBARN:2009:BL0530; CFI Arnhem 14 June 2010, ECLI:NL:RBARN:2010:BN4320.

argument.⁸⁹ In the case law study underlying this paper, (nearly) all judicially reviewed contract terms whose two-sidedness was *explicitly* referred to, have been declared fair.⁹⁰ In the above case, there is, however, something different going on. The two-sided banking GTC are not being put to the test. The judicial review pertains to a one-sided clause and it is the (approximate) *similarity* between the one-sided term and the two-sided private standard that is considered an evidence of fairness.⁹¹ The Dutch Supreme Court uses the two-sided general banking terms as a *benchmark* of fairness.

When two-sided GTC are being put to the test, the law and, more specifically, the grey list serve as the primary fairness benchmark for the Dutch judiciary (II.3). Even the ‘fair’ cancellation clauses whose two-sidedness was specifically acknowledged were initially *presumed* to be unfair,⁹² the explicit referral to their two-sidedness being one of the factors that rebutted this (legal) presumption. When the two-sidedness of a contract term is noticed, it generally passes the test or even acts as a benchmark of fairness.⁹³ The deviation from a two-sided term (to the detriment of the consumer) has, however, not yet explicitly been noticed in a civil procedure⁹⁴ and is not considered an evidence of unfairness.⁹⁵

In the UK, the publicly approved codes of conduct have as far as can be deducted from case law reports, not played any role in the judicial fairness assessment since terms reflecting or breaching those codes have not (yet) been

89 CA Den Bosch 9 August 2011, ECLI:NL:GHSHE:2011:BR6638 being an exception.

90 Except for two arbitration clauses: CFI Amsterdam 24 March 2010, ECLI:NL:RBAMS:2010:BM5984 and CA Amsterdam 17 April 2012, ECLI:NL:GHAMS:2012:BX3835.

91 C.M.D.S. Pavillon, ‘De bindende kracht van tweezijdige algemene voorwaarden’ (2013) *Nederlands Tijdschrift voor Burgerlijk Recht* 43, 371.

92 According to Article 237(i) of Book 6 of the Dutch Civil Code, a stipulation that forces the counterparty, in the event that the agreement is ended for another reason than a failure of the counterparty in the performance of his obligation, to pay a sum of money, is unfair *except as far as it concerns a reasonable compensation for the loss or missed profits of the user*.

93 In many cases involving two-sided GTC, courts nonetheless ‘omit’ to explicitly notice their two-sided nature. In those cases, bipartisan contract terms seem to have equal chances of either passing or failing the fairness test. This means that, all examined cases involving bilateral GTC put together, two-sided terms are more apt to be held fair than unilateral ones.

94 It has however been noticed in administrative procedures based on Article 6(2)(b) of the Unfair Commercial Practices Directive: CFI Rotterdam 19 January 2010, ECLI:NL:RBROT:2010:BK9796 & ECLI:NL:RBROT:2010:BK9798 and CFI Rotterdam 14 April 2011, ECLI:NL:RBROT:2011:BQ1281 two kitchen selling companies – both members of the Living Central Trade Association (CBW) – were sentenced for infringing on the CBW’s bilateral GTC: C.M.D.S. Pavillon, ‘The Interplay between the Unfair Commercial Practices Directive and Codes of Conduct’ (2012) *Erasmus Law Review* 4, 281–282.

95 Pavillon, n 91 above, 372.

subject to a judicial fairness test. The effective private enforcement may explain why disputes are not brought before courts and potential plaintiffs may abstain from litigating clauses that have been *ex ante* approved. The fact that public enforcement authorities have been directly involved into the drafting process may vouch for *in abstracto* fair GTC. The situation in the UK differs fundamentally from the situation in the Netherlands where enforcement authorities do not screen nor approve of the GTC before they are applied to B2C-contracts.

5 Private adjudication (*ex post* standards) flowing into the judicial interpretation of the legal fairness norm

Private mediators, adjudicators or arbitrators may apply the legal fairness test to GTC. The dispute committees of the SER review the fairness of two- and one-sided GTC and arbitrators (eg the Dutch Council for arbitration disputes) are often held to review the fairness of a jurisdiction clause.⁹⁶ The question is whether national courts refer to this ‘private’ jurisprudence when applying the fairness test.⁹⁷ Do decisions of private boards, when they are published (which is not always the case), work as a precedent or a guideline? Private rulings by Dutch mediators and arbitrators are widely accessible. Dutch courts however do not attach much value to their interpretation and application of the fairness test.⁹⁸ This doesn’t alter the fact that in the Netherlands, decisions by dispute committees guide the legal settlement of disputes involving GTC with help of other open norms such as the standard of reasonableness and fairness (thereby gaining legally binding force).⁹⁹ As I have not been able to trace any private rulings regarding the validity and applicability of contract terms in France and the UK, it comes as no surprise French and English courts never refer to such rulings in their fairness assessment.

⁹⁶ As shows the ‘case law’ of the the Dutch Court of Arbitration for the Building Industry.

⁹⁷ The outcome of alternative dispute resolution can sometimes be challenged before a judicial court. The judicial control on the private review however falls outside the ambit of this paper.

⁹⁸ In CFI Maastricht 14 October 2009, ECLI:NL:RBMAA:2009:BK1266, the user of GTC unsuccessfully invoked the ‘case law’ of the dispute committee on telecommunications as an argument.

⁹⁹ HR 12 January 1996, NJ 1996, 683. See I. Giesen, *Alternatieve regelgeving en privaatrecht* (Deventer: Kluwer, 2007) 99.

V The rationale behind the judicial endorsement of private standards

1 Distilling some criteria

The open norm of the UTD was designed to put contract terms to a broad fairness test in order to compensate for the imbalance that exists between the consumer and the seller or supplier. Courts generally have recourse to legal benchmarks to address and redress the imbalance (II.3). Private regulation influences the outcome of the fairness test in judicial procedures, especially in France and in the Netherlands. By taking this regulation into account while assessing the fairness of a contract term on the basis of a legal norm, civil courts confer legitimacy on it. This paragraph discusses the reasons why national courts chose to (partly) found the enforceability of a contract term on a standard that was (partly) set by private actors (besides the fact that courts are in need of guidance and additional fairness indicators). The fairness clause however sets a demanding objective standard as shows the reference to the good faith concept. This raises the question whether private regulation can be deemed fair or even be used as a benchmark of fairness.

2 A standard

To start with, only a *standard* can operate as a benchmark. A standard is something established by authority, custom, or general consent as a model or an example. Alignment with (market) custom presupposes that:

- the contract term is acknowledged, commonly used and widely accepted: to find out whether a contract term is usual or not, a court will for example compare different standard form contracts (both one- and two-sided).¹⁰⁰
- the standard term is based on economic records that are common for the sector. Dutch courts sometimes examine the economic considerations on which the standard term is founded. To this end they rely on information provided by the sectoral trade organisation.¹⁰¹

¹⁰⁰ CA Den Bosch 9 January 2007, ECLI:NL:GHSHE:2007:AZ5893.

¹⁰¹ CFI Alkmaar 20 October 2010, ECLI:NL:RBALK:2010:BP7266, para 8; CFI Alkmaar 19 October 2005, ECLI:NL:RBALK:2005:AV1131, para 8. Courts lack information about the idiosyncratic conditions under which particular markets operate and are keen on holding on to the information traders provide them.

In relation to custom, it is the repeated and widespread use of the contract term combined with *opinio juris* (especially when the term is two-sided as it shows a high degree of consensus) that makes the term binding and recognised by judges as a legal source.¹⁰² In Dutch case law, the customary nature of a contract term sometimes fixes the reasonable expectations of a *consumer* within the context of the fairness test (IV.2). In a few cases involving a dispute between a professional and a consumer, courts decided the consumer should reasonably expect a contract term that is in line with *market* norms. Their great significance in B2B disputes explains why those norms affect the fairness of consumer GTC.

Since the European fairness norm protects the consumer agreeing to terms drawn up in advance by the seller or supplier, one would however not expect the habitual nature of those terms to determine the outcome of the fairness test. By only basing the fairness of a contract term on its conformity with market norms, courts place the interests of the professional at its centre without balancing them against the consumer interests. As far as the consumer interests are not properly taken into account, this interpretation of the fairness-norm would be contrary to the purpose of the UTD, which is to prevent abusive exercise of private regulatory power and protecting the consumer as a weaker party. English courts have acknowledged that, since the good faith concept ‘*looks to good standards of commercial morality and practice*’, it is not the conventional nature of a practice, but its honest and reasonable character that matters.¹⁰³

Only *fair* standards can operate as standards of fairness. The main reason why private standards are deemed fair (two-sided GTC) or used as a benchmark of fairness (two-sided GTC and recommendations) is their co-regulatory nature: courts assume that cooperation with public entities (V.3) or cooperative negotiations between representatives of the parties in the market (V.4) warrant fairness.

3 A *fair* standard: public endorsement (co-regulation I)

In the interpretation of the fairness norm by French courts, the recommendations of the CCA have made up for the lack of legislative lists and the absence of bilateral GTC. Recommendations would, however, not have had the same impact on the fairness norm had they not officially emanated from a public organ. The administrative framework within which private actors cooperate and the legal

¹⁰² F. Cafaggi, ‘Private Regulation in European Private Law’, in A.S. Hartkamp *et al* (eds), *Towards a European Civil Code* (Alphen a/d Rijn: Kluwer, 2011) 108.

¹⁰³ *DGFT v First National Bank* [2001] 1 UKHL 52, para 17.

embedding of the recommendations explain their acceptance as a benchmark of fairness. In the same way, the SER setting the framework for the negotiations on bipartisan GTC increases their legitimacy.¹⁰⁴ Standardisation being mandated by a public authority can be held legitimate and fair. The public involvement spurs professionals to set higher standards than the legal standard, over and above the statutory minimum. Courts do not need to evaluate the legal content of the private regulation as respect for the legal requirements can be expected.

The involvement of a public authority does not, however, necessarily mean the minimum legal requirements are met. As bilateral GTC are largely inspired by default rules and the lists, one might expect that courts would always deem two-sided GTC fair. The open-textured legal provisions, however, permit diverging interpretations and Dutch courts do not necessarily have to acquiesce in the drafting parties' interpretation of the law. Even if the requirement is clear (black list), the public input in the industry-led standard-setting does not automatically bring the private standard in line with the legal standard. The involvement of the Dutch SER in the bilateral negotiations on consumer GTC does not vouch for the private standards being up to the legislative standard. Even though the law forms the point of departure for the negotiations, the final terms agreed upon sometimes diverge from the legal standard.¹⁰⁵ Such terms do not *a priori* fulfil the requirement of substantive fairness.

Unlike the English TSI (and previously the OFT), the SER does not *ex ante* endorse the GTC it helps to draft. In the absence of a sound approval mechanism, courts should always control the bipartisan GTC's conformity with the law before concluding to their fairness. More importantly, the ACM should in my opinion screen the substantive fairness of bipartisan GTC, something it does not do. According to the Dutch enforcement authority, two-sided GTC guarantee basic consumer rights.¹⁰⁶ This is, however, not always the case and should therefore be checked. The ACM could even endorse balanced GTC that meet the legal requirements. However, the further development of public endorsement schemes is highly improbable since the ACM is quite reticent towards the *ex ante* approval of private regulation (in view of its enforcement duties).

104 Whether the approval of a set of terms or a code of conduct by the OFT makes a difference is not clear. I am not aware of any cases involving GTC that have resulted from negotiations with the OFT.

105 Pavillon, n 91 above, 369–370.

106 See for example <www.acm.nl/nl/publicaties/publicatie/7219/In-meubel-en-keuken-branche-consument-vaak-onvoldoende-beschermd/> accessed 7 January 2014.

4 A fair standard: collective negotiations (co-regulation II)

The Dutch Civil Code deems the ‘coming into being of the GTC’ relevant to the fairness review (Article 233(a) of Book 6 of the Civil Code).¹⁰⁷ Although the two-sidedness of GTC is not systematically taken into consideration by lower courts, an analysis of Dutch case law shows that when a term’s two-sidedness is accounted for, the term (nearly) always passes the fairness test. Judging by the fact that Dutch bipartisan terms generally escape administrative scrutiny with regard to their fairness, respect for two-sidedness is even higher with the public enforcement authority (ACM).

The question then arises why two-sided terms are, overall, less likely to be viewed as unfair. Although courts that choose to put emphasis on the two-sidedness of GTC do not elaborate on this choice, they allegedly presume bipartisan terms to be ‘less suspect’ than unilateral terms. This presumption is evidently based on the fact that the Dutch Consumers’ Association has participated, as an equal partner, in the negotiations on GTC and consented to its outcome. Courts may hereby assume that the consumers’ interests were appropriately represented and secured during the process by the main consumer association in the Netherlands (with more than half a million members). The procedural guarantees provided for by the SER as well as the long tradition and past successes of this mutual dialogue may reinforce the assumption that two-sided GTC meet procedural and substantive fairness requirements such as the consumer’s ability to (indirectly) influence the substance of the terms and the obligation for the trader to take the consumer’s legitimate interests into account.

Courts should explicitly acknowledge the internal governance structure and accountability of private organisations prior to deeming their standards fair and even more so before using them as a benchmark of fairness.¹⁰⁸ The two-sidedness of standard terms and the democratic legitimacy of the consumer and trade organisations partaking in the negotiations should, however, not deprive the consumer from the legal protection he is entitled to receive. First, an *in abstracto* fair term may be unfair in view of the concrete circumstances surrounding the case (Article 4(1) UTD). The collective interests defended by a consumer association may differ from the interests of an individual consumer. Second, the presence of a consumer organisation at the negotiation table does not automatically vouch for *in abstracto* fair GTC (V.3). A negotiated standard term should be tackled if the

107 The Dutch Civil Code also stimulates bipartisan GTC by making the right to bring an action against a trader dependent on the acceptance to negotiate the adjustment of the terms (Articles 240(4) of Book 6).

108 Cf F. Cafaggi, ‘Self-regulation in European Contract Law’, in Collins (ed), n 85 above, 137.

consumers' interests were not adequately secured by their representatives at the time it was drafted. Sometimes trade off occurs and a detrimental term might be agreed upon in exchange for a more favourable term elsewhere in the contract or the setting up and continuation of an independent dispute committee.¹⁰⁹ And after a while, the result of the negotiations might have lost touch with recent legal developments (V.3).¹¹⁰

Courts should therefore always assess the substantive fairness of private regulation that has not publicly been screened or approved. This assessment is an abstract one if the regulation is subject to a preventive procedure or meant to be used as a standard of fairness. In an individual (repressive) procedure, an abstract assessment would also suffice as long as it benefits the consumer. If not, a court must take into account all the circumstances of the case at the time of conclusion of the contract (II.1). If the private standard has been publicly endorsed it should benefit from a presumption of fairness that may be refuted in an individual (repressive) procedure. Likewise, a term deviating from an endorsed private standard should be presumed unfair.¹¹¹

VI Conclusion: private standards of fairness with a view to harmonisation

Private policing of consumer GTC barely exists at the European level and does not contribute to the harmonised interpretation and application of the legislative fairness test. Sectoral models of European GTC are available,¹¹² but need to be adapted to national legal systems as the applicable standards differ a lot. At the

109 M.B.M. Loos, *Algemene voorwaarden* (The Hague: Boom Juridische uitgevers, (2013) para 217.

110 CFI Amsterdam 24 March 2010, ECLI:NL:RBAMS:2010:BM5984 and CA Amsterdam 17 April 2012, ECLI:NL:GHAMS:2012:BX3835: arbitration clauses in the NL are being heavily criticised for compromising access to justice and courts deeming them unfair point out at point (q) of the UTD-list. Another example is Article 17 of the 1996 GTC of the Netherlands association of contracting installing companies and technical retailers (UNETO-VNI), which breaches the Consumer Sales Directive.

111 Pavillon, n 91 above, 371–373.

112 See for a few examples the summary of the proceedings of the Workshop on Contract Law and Standard Terms and Conditions, Brussels, 19 January 2004: available at <ec.europa.eu/justice/newsroom/contract/events/040119_en.htm>. On the European level, the national laws of contract and the lack of a common frame of reference have been a major impediment to the creation of European sets of standard terms: A.G. Castermans, 'Towards a European Contract Law through Social Dialogue' (2011) *European Review of Contract Law* 2, 366–367. The Draft Common

European level there are, however, no consumer GTC, let alone two-sided terms or an alternative dispute resolution mechanism on GTC.¹¹³ Neither is there a European CCA that issues recommendations or advice.¹¹⁴ There are, for the time being, no private standards at the European level that courts applying the fairness norm could refer to. It does not look like the situation will evolve soon. In the meanwhile, national courts in search for private benchmarks can only revert to private standards from national origin.

The search for private benchmarks adds to the low degree of predictability about judicial decisions regarding the fairness of GTC. Among the national courts applying the fairness test under scrutiny, Dutch courts put the highest value on trade custom and usage. Business customs resemble default rules in the sense that they are nationally or even locally determined. It therefore seems unlikely that referring to them would generate a harmonised interpretation of the fairness norm throughout the EU.¹¹⁵ Moreover, by bringing trade customs into prominence, courts disregard the normative standard set by the UTD.¹¹⁶

The availability of private regulation and the importance courts attach to the available private standards when assessing the fairness of a term vary from MS to MS. Among the reviewed countries, the Netherlands also are the only country where bilateral negotiations on GTC take place on a large scale.¹¹⁷ Consumer associations are actively involved into the drafting of the terms, thereby affecting the judicial appreciation of GTC. Harmonisation is here again at stake since a consideration such as the two-sidedness of GTC is irrelevant in other MS. What significance should be attached to the fact that a consumer body was involved into the drafting of the GTC? How does this involvement relate to Article 2(3) UTD that actually points at the inability of *individual* consumers to influence the substance of the term? Should the bilateral enactment of the GTC induce a different interpretation of the fairness norm (affecting either the good faith or the

Frame of Reference and the proposed Regulation on an Optional Common European Sales Law might in the future enable professionals to draw up contracts that can be used throughout the EU.

113 Recently there has been a plea for a social dialogue on the European level under the auspices of the European Commission. European Consultation Groups after the Dutch model could draft sector-specific documents that can be used anywhere and identify in advance the choices the trader needs to make at the national level: see Castermans, n 112 above.

114 The Committee on unfair terms in consumer contracts Article 40 of the Proposal for a Directive on consumer rights provided for could perhaps have fulfilled a similar role at the European level.

115 H. Collins, 'EC Regulation of Unfair Commercial Practices', in Collins (ed), n 1 above, 795.

116 The question arises whether courts should hold on to custom and usage as the fairness clause was designed as a regulatory control on market practices.

117 There are many examples of bilateral GTC in Germany as well.

imbalance criterion) in an individual setting? For the sake of (minimum) harmonisation and consumer protection, the further development of criteria to determine whether a private (or mixed) standard amounts to a standard of fairness is much to be welcomed.

Note: This study was completed on 1st January 2014.